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1 to each other and concurrently with a sentence imposed in a separate Maricopa County case,  
2 failure to register as a sex offender. (Doc. 16, p. 8); (Doc. 16-1, pp. 120-121, 148-149) Clark  
3 received no presentence incarceration credit for either case. *Id.* At the same time, Clark was  
4 sentenced to a 5-year period of supervised probation in the burglary case. (Doc. 16, p. 8) (Doc.  
5 16-1, pp. 96-98) The sentence was run consecutively to the sentences for drug possession,  
6 credit card theft, and the Maricopa County case. *Id.* It appears that Clark received 117 days of  
7 presentence incarceration credit in the burglary case. *Id.*; (Doc. 16-1, pp. 84-85)

8 On August 9, 2016, Clark filed notice of post-conviction relief (PCR) in the drug  
9 possession case and the credit card theft case<sup>1</sup>. (Doc. 16-1, pp. 169-171) That same day, he  
10 filed a PCR petition in which he argued he was entitled to 117 days of presentence incarceration  
11 credit for the drug possession case because he was given 117 days of credit for the burglary  
12 case. (Doc. 16-1, pp. 173-176) On December 15, 2016, appointed PCR counsel advised the  
13 court that she could find no meritorious issues to raise. (Doc. 16-1, p. 182)

14 Clark filed a pro se PCR petition on January 9, 2017. (Doc. 16-1, p. 185) He argued that  
15 the 117 days of presentence credit should have been applied to his drug possession and credit  
16 card theft sentences. (Doc. 16-1, p. 185) The trial court denied the PCR petition on April 7,  
17 2017, finding “no error in the time credit calculation.” (Doc. 16-1, p. 202) Clark did not seek  
18 review from the Arizona Court of Appeals. (Doc. 16, p. 10); (Doc. 16-2, p. 104)

19 On November 8, 2017, Clark filed a second notice of PCR in the drug possession and  
20 credit card theft cases. (Doc. 16-2, p. 28) He filed a PCR petition on the same day in which he  
21 argued 105 days of sentencing credit should have been applied to his drug possession/credit card  
22 theft cases and not his burglary case. (Doc. 16-2, pp. 32-38); (Doc. 16-2, p. 104) On  
23 November 20, 2017, the trial court denied the petition. (Doc. 16-2, p. 40)

24 Clark filed a petition for review on December 12, 2017. (Doc. 16-2, pp. 59-62) On May  
25 25, 2018, the Arizona Court of Appeals granted review but denied relief because the petition

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27 <sup>1</sup> The court recognizes that Clark could be entitled to an earlier constructive filing date pursuant  
28 to the “prison mailbox rule.” The court does not pursue the issue because it assumes, without deciding,  
that the petition is timely.

1 was untimely and successive. (Doc. 16-2, pp. 103-105) Clark filed a petition for review with  
2 the Arizona Supreme Court on June 27, 2018. (Doc. 16-2, pp. 111-122) That court denied the  
3 petition without comment on August 24, 2018. (Doc. 16-2, p. 130)

4 Clark filed a third PCR notice on December 13, 2018. (Doc. 16-2, pp. 132-134) He filed  
5 a petition the same day arguing he was entitled to 257 days of jail credit when the Maricopa  
6 Case was dismissed so that credit should be applied to the drug possession and credit card theft  
7 cases. (Doc. 16-2, pp. 136); (Doc. 16-2, p. 141) (“On March 30, 2018, 766 days after  
8 sentencing the State moved to dismiss” the Maricopa County case.) On January 9, 2019, the  
9 trial court denied the petition because presentence incarceration credit can only be applied once  
10 where consecutive sentences are imposed. (Doc. 16-2, pp. 141-142) Clark filed a petition for  
11 review on January 22, 2019. (Doc. 16-2, p. 168) Neither party has informed the court whether  
12 a ruling has been issued.

13 Previously, on September 11, 2018, Clark filed the pending petition for writ of habeas  
14 corpus in this court. (Doc. 1) He claims (1) trial counsel was ineffective for failing to  
15 investigate and present evidence that he was entitled to 105 days of presentence credit and (2)  
16 the trial court failed to hold an evidentiary hearing to determine if he was due 105 days of  
17 presentence credit. *Id.* Clark asserts that his claims were presented to the Arizona Court of  
18 Appeals in his second PCR petition. (Doc. 1, pp. 6, 7) The court assumes without deciding that  
19 both claims are cognizable in a habeas corpus proceeding.

20 The respondents filed an answer on March 7, 2019, arguing, among other things, that  
21 Clark’s two claims are procedurally defaulted. (Doc. 16) Clark filed a reply on March 18, 2019  
22 in which he argues he is entitled to 105 days of presentence credit because that time was never  
23 credited to any of his sentences. (Doc. 17) He does not address the issue of procedural default.  
24 *Id.*

## 25 26 Discussion

27 The writ of habeas corpus affords relief to persons in custody in violation of the  
28 Constitution or laws or treaties of the United States. 28 U.S.C. § 2254(a). If the petitioner is

1 in custody pursuant to the judgment of a state court, the writ will not be granted unless prior  
2 adjudication of the claim –

3 (1) resulted in a decision that was contrary to, or involved an unreasonable  
4 application of, clearly established Federal law, as determined by the Supreme  
Court of the United States; or

5 (2) resulted in a decision that was based on an unreasonable determination of the  
6 facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

7 “[The] standard is intentionally difficult to meet.” *Woods v. Donald*, 135 S.Ct. 1372,  
8 1376 (2015). “[C]learly established Federal law’ for purposes of § 2254(d)(1) includes only  
9 the holdings, as opposed to the dicta, of th[e] [Supreme] Court’s decisions.” *Id.* If the highest  
10 state court fails to explain its decision, this court looks to the last reasoned state court decision.  
11 *See Brown v. Palmateer*, 379 F.3d 1089, 1092 (9<sup>th</sup> Cir. 2004).

12 Federal habeas review is limited to those claims for which the petitioner has already  
13 sought redress in the state courts. This so-called “exhaustion rule” reads in pertinent part as  
14 follows:

15 An application for a writ of habeas corpus on behalf of a person in custody  
16 pursuant to the judgment of a State court shall not be granted unless it appears  
17 that – (A) the applicant has exhausted the remedies available in the courts of the  
State. . . .

18 28 U.S.C. § 2254(b)(1)(A).

19 To be properly exhausted, a claim must be “fairly presented” to the state courts. *Weaver*  
20 *v. Thompson*, 197 F.3d 359, 364 (9<sup>th</sup> Cir. 1999). In other words, the state courts must be  
21 apprised of the issue and given the first opportunity to rule on the merits. *Id.* “The state courts  
22 have been given a sufficient opportunity to hear an issue when the petitioner has presented the  
23 state court with the issue’s factual and legal basis.” *Id.*

24 In addition, the petitioner must explicitly alert the state court that he is raising a *federal*  
25 constitutional claim. *Casey v. Moore*, 386 F.3d 896, 910-11 (9<sup>th</sup> Cir. 2004), *cert. denied*, 545  
26 U.S. 1146 (2005). The petitioner must make the federal basis of the claim explicit either by  
27 citing specific provisions of federal law or federal case law, even if the federal basis of a claim  
28 is “self-evident,” *Gatlin v. Madding*, 189 F.3d 882, 888 (9<sup>th</sup> Cir. 1999), *cert. denied*, 528 U.S.

1 1087 (2000), or by citing state cases that explicitly analyze the same federal constitutional  
2 claim, *Peterson v. Lampert*, 319 F.3d 1153, 1158 (9<sup>th</sup> Cir. 2003) (en banc).

3 If the petitioner is in custody pursuant to a judgment imposed by the State of Arizona,  
4 he must present his claims to the Arizona Court of Appeals for review. *Castillo v. McFadden*,  
5 399 F.3d 993, 998 (9<sup>th</sup> Cir. 2005), *cert. denied*, 546 U.S. 818 (2005); *Swoopes v. Sublett*, 196  
6 F.3d 1008 (9<sup>th</sup> Cir. 1999), *cert. denied*, 529 U.S. 1124 (2000). If state remedies have not been  
7 properly exhausted, the petition may not be granted and ordinarily should be dismissed without  
8 prejudice. *See Johnson v. Lewis*, 929 F.2d 460, 463 (9<sup>th</sup> Cir. 1991). In the alternative, the court  
9 has the authority to deny on the merits rather than dismiss for failure to properly exhaust. 28  
10 U.S.C. § 2254(b)(2).

11 A claim is “procedurally defaulted” if the state court declined to address the claim on the  
12 merits for procedural reasons. *Franklin v. Johnson*, 290 F.3d 1223, 1230 (9<sup>th</sup> Cir. 2002).  
13 Procedural default also occurs if the claim was not presented to the state court and it is clear the  
14 state would raise a procedural bar if it were presented now. *Id.*

15 Procedural default may be excused if the petitioner can “demonstrate cause for the  
16 default and actual prejudice as a result of the alleged violation of federal law, or demonstrate  
17 that failure to consider the claims will result in a fundamental miscarriage of justice.” *Boyd v.*  
18 *Thompson*, 147 F.3d 1124, 1126 (9<sup>th</sup> Cir. 1998). “To qualify for the fundamental miscarriage  
19 of justice exception to the procedural default rule, however, [the petitioner] must show that a  
20 constitutional violation has probably resulted in the conviction when he was actually innocent  
21 of the offense.” *Cook v. Schriro*, 538 F.3d 1000, 1028 (9<sup>th</sup> Cir. 2008).

22 If a claim is procedurally defaulted and is not excused, the claim should be dismissed  
23 with prejudice because the claim was not properly exhausted and “the petitioner has no further  
24 recourse in state court.” *Franklin*, 290 F.3d at 1231.

25 In this case, Clark maintains that he presented his two claims to the Arizona Court of  
26 Appeals in his petition for review from the trial court’s denial of his second PCR petition. (Doc.  
27 1, pp. 6, 7) He did not. In that petition for review, Clark argued that he was entitled to 105 days  
28 of presentence incarceration credits. (Doc. 16-2, pp. 59-62) He did not argue that trial counsel

1 was ineffective or that the trial court erred by failing to hold an evidentiary hearing<sup>2</sup>. *Id.*  
2 Accordingly, he did not fairly present his two habeas claims to the Arizona Court of Appeals.

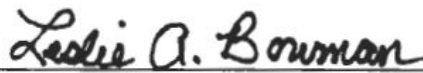
3 Moreover, Clark is precluded from returning to state court and presenting them now. *See*  
4 Ariz.R.Crim.P. 32.2(a) (Claims that could have been presented before are precluded.), 32.4(a)  
5 (PCR of-right notice must be filed no later than 90 days after entry of judgment and sentence.).  
6 They are procedurally defaulted. *Franklin v. Johnson*, 290 F.3d 1223, 1230 (9<sup>th</sup> Cir. 2002).  
7 Clark does not argue in his reply brief that this default should be excused.

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9 RECOMMENDATION

10 The Magistrate Judge recommends that the District Court, after its independent review  
11 of the record, enter an order Denying the petition for writ of habeas corpus. (Doc. 1) Clark's  
12 two habeas claims are procedurally defaulted.

13 Pursuant to 28 U.S.C. §636 (b), any party may serve and file written objections within  
14 14 days of being served with a copy of this report and recommendation. If objections are not  
15 timely filed, they may be deemed waived. The Local Rules permit a response to an objection.  
16 They do not permit a reply to a response.

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18 DATED this 3<sup>rd</sup> day of June, 2019.

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21 Leslie A. Bowman  
22 United States Magistrate Judge  
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27 <sup>2</sup> If he did raise those arguments, Clark would still be out of luck because the Arizona Court  
28 of Appeals declined to address the merits of the petition for procedural reasons. *Franklin v. Johnson*,  
290 F.3d 1223, 1230 (9<sup>th</sup> Cir. 2002).